



## Case Western Reserve Law Review

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Volume 21 | Issue 2

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1970

# Recent Decisions: Constitutional Law - Equal Protection of the Laws - Inheritance by Illegitimates [*Strahan v. Straban*, 304 F. Supp. 40 (W.D. La. 1969)]

Norman A. Levine

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### Recommended Citation

Norman A. Levine, *Recent Decisions: Constitutional Law - Equal Protection of the Laws - Inheritance by Illegitimates* [*Strahan v. Straban*, 304 F. Supp. 40 (W.D. La. 1969)], 21 Case W. Res. L. Rev. 292 (1970)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol21/iss2/8>

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ing a patent into the judicial arena may pressure the licensor into reducing the royalties. Still, the inclination of most licensees will probably be to maintain good will with a resourceful and productive inventor. However, to the extent that licensees are not predisposed to good-faith negotiation with inventors, the *Lear* decision may well have an adverse effect on some business relationships.

By redefining the rights of licensees to enable them to challenge the patent underlying their agreement, the Court has further restricted and narrowed the monopolistic effects inherent in the patent system. But it is obvious that *Lear* has done more than overrule an antiquated common law doctrine. In fashioning the new right to suspend royalty payments, the Court noted that the contract between *Lear* and *Adkins* was not controlling in light of federal policy. Implicit in this statement is the general observation that unwarranted monopolies should not remain unchallenged because of doctrinal defects both in the federal patent system and in contracts grounded in state law. Thus, the Court stands poised to strictly construe a patentee's rights, even to the point of extinction, both on the federal and the state level. In questioning whether states can enforce contracts relating to unpatented ideas, the Court may well be preparing to launch an assault on still another facet of state law — the trade secret.

JAMES M. STEPHENS

#### CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS — INHERITANCE BY ILLEGITIMATES

*Strahan v. Strahan*, 304 F. Supp. 40 (W.D. La. 1969).

Historically, the bastard has been relegated to the societal disrepute of prostitutes, thieves, and beggars. The stigma of bastardy has deprived the illegitimate of the normal benefits of society and has produced incalculable psychological harm.<sup>1</sup> Most reprehensible, however, has been the plague of legal disability visited upon the bastard solely because of his ignoble conception.<sup>2</sup> In 1968, the

<sup>1</sup> See Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOCIOLOGY 215 (1939).

<sup>2</sup> The disabilities attaching to bastardy are even more aggravated considering that the illegitimate has always been subject to the duties and responsibilities of full citizenship, notwithstanding the absence of his correlative rights. See *Levy v. Louisiana*, 391 U.S. 68, 71 (1968), where the Supreme Court pointed out that the illegitimate, as all

United States Supreme Court first loosened the straits of jural deprivation in *Levy v. Louisiana*<sup>3</sup> and *Glon v. American Guarantee & Liability Insurance Co.*<sup>4</sup> which held that a state wrongful death statute discriminating on the basis of illegitimacy violated the equal protection clause of the 14th amendment. These landmark decisions opened the way to challenge the constitutionality of all statutory classifications using illegitimacy as the criterion.

The recent case of *Strahan v. Strahan*<sup>5</sup> was the first decision, following *Levy* and *Glon*, to take up the gauntlet — this time in response to an illegitimate's quest for equal rights in intestate succession. The succession laws of Louisiana preclude unacknowledged illegitimates from taking from their alleged mothers or fathers;<sup>6</sup> the plaintiff, claiming to be the illegitimate son of the intestate, nevertheless asserted that he was entitled to share as a natural son in the intestate's estate. The plaintiff theorized that the laws of Louisiana violated the equal protection clause of the 14th amendment by denying to unacknowledged illegitimates the rights of inheritance enjoyed by the legitimate issue of an intestate. In granting the defendant's motion for summary judgment, the court held that Louisiana's succession statute was not violative of the 14th amendment.<sup>7</sup>

The *Strahan* court, in rejecting the plaintiff's plea for a share of the decedent's estate, concluded that the state's distinction between legitimates and illegitimates was neither arbitrary nor lacking in reason. To the extent that the court may have relied upon the fact that the plaintiff had *never* been acknowledged by the decedent, the result in *Strahan* is arguably consistent with the constitutional mandate of equal protection.<sup>8</sup> However, to the extent that *Strahan* represents judicial approbation of statutory exclusion from the fruits of intestate succession of illegitimates either who have been acknowl-

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other citizens, must pay taxes and is eligible for the draft under the Selective Service Act.

<sup>3</sup> 391 U.S. 68 (1968). The Court held that the denial of a right of action to five illegitimate children for the wrongful death of their mother constituted invidious discrimination which denied them equal protection of the laws as guaranteed by the 14th amendment.

<sup>4</sup> 391 U.S. 73 (1968). The Court held that where the claimant was unquestionably the decedent's natural mother, the state denied her equal protection by withholding a right of action for the wrongful death of her son merely because he was illegitimate.

<sup>5</sup> 304 F. Supp. 40 (W.D. La. 1969).

<sup>6</sup> LA. CIV. CODE ANN. art. 920 (West 1952).

<sup>7</sup> 304 F. Supp. at 42.

<sup>8</sup> See text accompanying notes 43-45 *infra*.

edged by the decedent or who have proved the paternity of the decedent, the decision poses a conflict of constitutional magnitude relating to the scope of federal interference with a state's power to regulate and control intestate succession.<sup>9</sup>

The threshold question raised by *Strahan* is whether the equal protection mandate can *ever* outweigh the traditional sovereignty of the states over intestate succession. As an original proposition, it is generally uncontested that the states may prescribe standards for intestate succession because "the concepts of real property are deeply rooted in state traditions, customs, habits and laws."<sup>10</sup> On the other hand, a state statute may not impinge upon rights guaranteed to every citizen by the Constitution.<sup>11</sup> The inquiry necessitates a comparison of the justifications of state interest proffered in *Strahan* with the justification of federal dominion articulated in *Levy* and *Glona*.

In limiting the scope of *Levy* and *Glona*, the *Strahan* court reasoned first that the state's policy of encouraging marriage and discouraging promiscuity was in consonance with a statutory scheme of succession that reflected a strong preference for traditional family relationships.<sup>12</sup> Secondly, the state's concern in maintaining stability of land titles, always a legitimate state interest,<sup>13</sup> was deemed paramount in the shadow of disruptive and potentially spurious property claims by alleged illegitimate offspring.<sup>14</sup> The court distinguished *Levy* and *Glona* because of the nature of the statutory

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<sup>9</sup> The court's failure even to mention whether the plaintiff had been legitimated suggests an oversimplified rejection of the equal protection clause in the area of intestate succession. See text accompanying notes 43-45 *infra*.

<sup>10</sup> 304 F. Supp. at 43, quoting *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 210 (1946); see *United States v. Burnison*, 339 U.S. 87, 90-93 (1950); *United States v. Fox*, 94 U.S. 315, 320 (1876).

It has been said that "there is no inherent right in anyone to succeed to the estate of a person deceased, and the rules of transmission or devolution of property in such cases are left to the wisdom of the lawmaking power of the state." *Minor v. Young*, 149 La. 583, 588, 89 So. 757, 759 (1920).

<sup>11</sup> U.S. CONST. amend. XIV, § 1 provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws . . ." It has been said that the duty to insure secure titles to real property and to provide methods for resolving unsettled questions regarding titles "is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless it conflict [*sic*] with some special inhibitions of the Constitution, or against natural justice." *American Land Co. v. Zeiss*, 219 U.S. 47, 61 (1910), quoting *Arndt v. Griggs*, 134 U.S. 316, 321 (1889) (emphasis added).

<sup>12</sup> 304 F. Supp. at 42.

<sup>13</sup> See note 10 *supra* & accompanying text.

<sup>14</sup> 304 F. Supp. at 42-43.

rights created by the wrongful death statute involved therein.<sup>15</sup> Whereas the wrongful death act created a discretionary right of action that was nonexistent prior to its enactment, Louisiana's intestacy law was steeped in preexistent legal tradition<sup>16</sup> and reflected a combination of the continental civil code and the English common law.

The common law was historically more austere than the continental civil code with regard to inheritance by illegitimates. While at common law an illegitimate was characterized *nullius filius*, "the son of no one," and could not inherit *from or through* his mother or father,<sup>17</sup> an illegitimate under the civil law had a limited capacity to inherit *from* his mother or father provided that he had been duly acknowledged as a natural child.<sup>18</sup>

Although most American jurisdictions of common law heritage have modified or completely abrogated the severity of the common law rule denying rights of inheritance to the illegitimate,<sup>19</sup> the illegitimate's right to intestate succession in Louisiana is entirely dependent upon acknowledgment by the parent from whom he seeks to inherit.<sup>20</sup> Even the acknowledged illegitimate only has a

<sup>15</sup> *Id.*, at 41.

<sup>16</sup> *Id.*

<sup>17</sup> 10 AM. JUR. 2D *Bastards* §§ 8, 146 (1963). "[T]he concept of *nullius filius* arose, not out of the difficulty of actual proof of the real father and the concurrent fear of fraudulent claims against estates, but rather as a result of what the child was—i.e., the product of immoral relations." Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 47 (1959). The origin of the legislative distinction between legitimates and illegitimates was founded not in reason but in prejudice, growing out of the Christian ideal of marriage. See Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 498-99 (1967). Following some ameliorative modifications of the common law doctrine of *nullius filius*, the illegitimate could more easily inherit *from*, as opposed to *through*, a parent. Those states permitting the illegitimate to inherit from his mother or father, i.e., directly from his parent's estate, posit the right upon the biological affinity between parent and child. Although this theory could be applied as well in the *through* context to provide the illegitimate with a right to inherit through the mother [*Michaelson v. Undhjem*, 162 N.W.2d 861 (N.D. 1968)], it is more difficult to employ with respect to the father. If the child is unacknowledged, the biological relationship doctrine is not controlling with respect to the father and, a fortiori, would not extend to ancestors. Furthermore, policy dictates that forcing such an heir upon a relative of the father is beyond the implied intent of the ascendant. However, in light of *Levy*, it is likely that this differentiation between inheritance from or through a father will no longer be effective provided that the illegitimate can prove paternity.

<sup>18</sup> 10 C.J.S. *Bastards* § 24 (1938).

<sup>19</sup> See 6 R. POWELL, REAL PROPERTY ¶ 1003 (4th ed. 1969).

<sup>20</sup> Early Louisiana jurisprudence distinguished between the necessity of formal acknowledgment by the mother and the necessity of such an acknowledgment by the father. The father could acknowledge only by compliance with the specific methods provided in the Civil Code. See Comment, *What Effect Has Proof of Maternity*, 6 LA. L. REV. 268 (1945). LA. CIV. CODE ANN. art. 203 (West 1952) provides:

[T]he acknowledgment of an illegitimate child shall be made by a declara-

*possibility* of sharing in the succession property. If acknowledged by the mother, he inherits from her only in the absence of lawful descendants.<sup>21</sup> If acknowledged by the father, the illegitimate is placed in an even more tenuous position as he inherits only in the absence of ascendants, descendants, and collaterals, *i.e.*, to the exclusion of escheat to the state.<sup>22</sup>

In contrast to the strictures imposed by Louisiana law, every state except Louisiana has enacted statutes enabling an illegitimate to inherit from his mother.<sup>23</sup> By providing that the illegitimate may inherit from his father's estate only where he has been legitimated by intermarriage and/or acknowledged by his father, these statutes resemble the Louisiana law. But the resemblance ceases here because the more recent enabling statutes establish an *immediate* right to succession,<sup>24</sup> while, on the other hand, a Louisiana illegitimate inherits from his father only in the absence of ascendants, descendants, and collaterals. Resultantly, the potential for

tion executed before a notary public, in presence of two witnesses, by the father and mother or either of them, whenever it shall not have been made in the registering of the birth or baptism of such child.

The acknowledgment requirements have been modified, and it is now possible for the father as well as the mother to acknowledge by modes other than those enumerated in article 203. *See* Succession of Corsey, 171 La. 663, 131 So. 841 (1930). These other modes, collectively referred to as "informal acknowledgment," are admissions of paternity or maternity by operation of law. *See* Succession of Corsey, *supra*; *Murdock v. Potter*, 155 La. 145, 99 So. 18 (1923); *Taylor v. Allen*, 151 La. 82, 91 So. 635 (1922); *Ford v. Calhoun*, 6 La. App. 350 (2d Cir. 1927).

<sup>21</sup> LA. CIV. CODE ANN. art. 918 (West 1952).

<sup>22</sup> LA. CIV. CODE ANN. art. 919 (West 1952).

<sup>23</sup> 6 R. POWELL, *supra* note 19, § 1003, at 685. These statutes rest upon the principles that the consanguinity of mother and child ought to produce the ordinary consequences of a biological relationship and that it is unjust to visit the sins of the mother upon the unoffending offspring. *See* *Levy v. Louisiana*, 391 U.S. 68 (1968); *cf. Baston v. Sears*, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968). Many states granting complete rights of intestate succession as between mother and child also grant complete rights of intestate succession as between the relatives of the mother and the child. *See, e.g.,* MASS. ANN. LAWS ch. 190, § 6 (1955); N.H. REV. STAT. ANN. § 561.4 (1955); PA. STAT. ANN. tit. 20, § 1.7 (1950). For the most part, the remaining states are inexplicably more liberal in permitting the maternal relatives to take from the child born out of wedlock than they are in recognizing such child's rights to inherit from the maternal relatives. *See* R. POWELL, *supra*, § 1003. There can be no possible explanation for this asymmetrical treatment because the child is no more deserving of opprobrium for the indiscretions of the mother where he seeks to inherit from maternal relatives than where he seeks to inherit from his mother. *Cf. Levy v. Louisiana*, 391 U.S. 68, 72 (1968). The problem of determining whether an illegitimate is entitled to inherit through his deceased mother from her ancestors or collateral kindred becomes one of statutory interpretation and application when the statutes are silent as to such rights.

<sup>24</sup> *See, e.g.,* DEL. CODE ANN. tit. 13, §§ 1301, 1304 (1953); MASS. ANN. LAWS ch. 190, § 7 (1958); N.J. STAT. ANN. § 3A:4-7 (1953); PA. STAT. ANN. tit. 20, § 1.7 (1950). *See also* Annot., 48 A.L.R.2d 759, 776-77 (1956).

an illegitimate's disinheritance is far greater in Louisiana than in other states.<sup>25</sup>

The current trend toward reducing the disabilities of bastardy is a relatively recent phenomenon.<sup>26</sup> Before the *Levy* decision, few cases involving the rights of illegitimates reached the High Court, and not once was the equal protection clause used to challenge the validity of discrimination against the illegitimate.<sup>27</sup> Legal commentators, seeking to ameliorate the illegitimate's unenviable lot, began to develop and espouse a new constitutional theory — that to classify on the basis of legitimacy was a violation of the equal protection clause of the 14th amendment.<sup>28</sup>

In *Levy*, the Supreme Court first employed the doctrine of equal protection in behalf of illegitimates,<sup>29</sup> and as a consequence

<sup>25</sup> See text accompanying notes 21-22 *supra*.

<sup>26</sup> Arizona and Oregon have successfully discarded *all* concepts of discrimination based upon illegitimacy. ARIZ. REV. STAT. ANN. § 14-206 (1956) provides:

A. Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock, except that he is not entitled to the right to dwell or reside with the family of his father, if the father is married.

B. Every child shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock.

C. This section shall apply although the natural father of such child is married to a woman other than the mother of the child, as well as when he is single.

ORE. REV. STAT. § 109.060 (1967) provides: "The legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married."

<sup>27</sup> In *DeSylva v. Ballentine*, 351 U.S. 570, 580-81 (1956), the Court held that there "is no federal law of domestic relations, which is primarily a matter of state concern. . . . [W]e think it proper . . . to draw upon the ready-made body of state law to define the word 'children' . . . ." Likewise, in *Blagge v. Balch*, 162 U.S. 439, 464 (1896), the Court would not define the words "next of kin" when they appeared in a federal statute, but relied upon the law of the state in which the individual resided. See *Cope v. Cope*, 137 U.S. 682 (1891), holding that it was for the state legislature and not the Court to set standards permitting illegitimate children to inherit from their father; *Brewer's Lessee v. Blougher*, 39 U.S. (14 Pet.) 177, 198 (1840), holding that when a state legislature speaks in general terms of "children," the High Court is bound to interpret this as meaning *all* children including incestuous illegitimates.

<sup>28</sup> Notwithstanding Mr. Justice Holmes' characterization of the equal protection clause as the "last resort of constitutional arguments" [*Buck v. Bell*, 274 U.S. 200, 208 (1927)], this principle has won significant victories in the controversial areas of race relations, state legislative reapportionment, and criminal process. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Brown v. Board of Educ.*, 347 U.S. 483 (1954). It has also been suggested that the clause be applied to such additional fields as law enforcement and public welfare. See, e.g., Harvith, *Federal Equal Protection and Welfare Assistance*, 31 ALBANY L. REV. 210 (1967).

<sup>29</sup> Appellant, on behalf of five illegitimate children, sued to recover under a Louisiana statute for the wrongful death of their mother. The state district court dismissed the suit and the state court of appeals affirmed, holding that "child" in Article 2315

the legal status of legitimate and illegitimate children was equalized with regard to wrongful death claims in behalf of their decedent mothers. It is possible, therefore, at least on the precise facts of *Levy*, to strike down legislative classifications based upon illegitimacy. In a broader sense, the decision suggests that a federal interest manifested by the constitutional requirement of equal protection of the laws *can* outweigh state expression of policy with respect to other prohibitory classifications using the touchstone of legitimacy.<sup>30</sup> Assuming, arguendo, the applicability of the equal protection clause to other legislative classifications based on illegitimacy, it is necessary to articulate standards of application in determining whether the scope of the *Levy* rationale applies in the area of intestate succession involved in *Strahan*.

Not all state legislation which classifies citizens differently may be challenged as a denial of equal protection. Distinctions drawn by state law do not violate the equal protection clause unless they are irrational, arbitrary, or invidious. It is permissible for the states to classify differently but only if all people similarly situated are included in the classification, and it can be shown that the differential treatment is justifiable.<sup>31</sup> With respect to the second branch of the general rule, the classic test is whether the classification under state

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of the Louisiana Civil Code did not include illegitimate children. Based upon morals and general welfare, recovery was denied in order to "[discourage] bringing children into the world out of wedlock." 192 So. 2d 193, 195 (La. Ct. App. 1966). On appeal, the United States Supreme Court reversed in a 6-3 decision, holding that it was a denial of equal protection to prohibit illegitimate children from suing for the wrongful death of their mother. The Court reasoned that the classification excluding illegitimate children was discriminatory since "legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother." 391 U.S. at 72.

<sup>30</sup> The extension of *Levy* into the area of intestate succession has already been ushered in by the Supreme Court of North Dakota's condemnation as unconstitutional a statute which denied an illegitimate child the right to inherit from the legitimate child of the same mother. *Michaelson v. Undhjem*, 162 N.W.2d 861 (N.D. 1968).

<sup>31</sup> See *Douglas v. California*, 372 U.S. 353, 357 (1963) ("where the merits of the *one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor"); *Morey v. Doud*, 354 U.S. 457 (1957) (an act exempting American Express Co. money orders from currency regulation was declared in violation of the equal protection clause because there was no reasonable relationship between the exemption and the purposes of the act); *Hernandez v. Texas*, 347 U.S. 475 (1954) (a systematic exclusion of persons of Mexican descent from service as jurors in a county in which petitioner, a person of Mexican descent was indicted and tried, denied him equal protection of the laws); *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459 (1937) (a statutory discrimination between mutual companies and stock companies writing fire and casualty insurance in the state, forbidding stock companies to act through salaried agents but permitting this to mutual companies, held repugnant to the equal protection clause). See also Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949); *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1067, 1076-77 (1969).



law bears a pertinent and reasonable relation to the purposes which the law seeks to achieve.<sup>32</sup>

In formulating the precise standard of equal protection applicable to allegedly invalid legislative classifications, the initial question is whether the legislative enactment purports to regulate economic activity or basic civil rights. Regarding classifications of a purely economic nature, the Supreme Court has held that the equal protection clause requires only a *rational* connection between the classification and a valid legislative purpose; if a rational relationship is shown, the Court will not substitute its beliefs for the judgment of the state legislature.<sup>33</sup> However, a classification that denies to a group a fundamental right or liberty must bear more than a showing of a rational connection with a legitimate public purpose in the area of basic civil rights or it will be nullified as invidious discrimination violative of the equal protection clause.<sup>34</sup> The requirement of an overriding statutory purpose in this area casts the burden of justification on the state rather than on the challenging party.<sup>35</sup>

In defining the area of basic civil rights, the Supreme Court has

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<sup>32</sup> See *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928) (a statute that conditions the recording of mortgages not maturing within 5 years upon the payment of a tax of 20 cents per \$100 of value secured but exempts mortgages maturing within that period declared void under the equal protection clause); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920) (a statute which taxed local corporations on income derived from both in-state and out-of-state operations while entirely exempting locally chartered corporations which conducted all of their business outside the state was declared invalid).

<sup>33</sup> See *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (a statute making it a misdemeanor for any person to engage in the business of debt adjusting with the exception of lawyers was not a denial of equal protection to nonlawyers); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (a statute making it unlawful for any person not a licensed optometrist to fit lenses and replace them into frames except upon written authority from a licensed optometrist while exempting all sellers of ready-to-wear glasses did not violate the equal protection clause).

<sup>34</sup> See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (in a suit by Negroes seeking to register as voters, a state poll tax was held violative of equal protection on the ground that it discriminated between rich and poor); *Louisiana v. United States*, 380 U.S. 145 (1965) (in a suit to prevent discrimination against Negroes seeking to register as voters, a state "interpretation test" held violative of equal protection); *Carrington v. Rash*, 380 U.S. 89 (1965) (a statute denying a member of the armed forces a right to vote who is a bona fide domiciliary of the state and but for his occupation would be eligible to vote held violative of equal protection); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (a statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room in the nighttime while not forbidding this conduct between couples of the same race denies equal protection of the laws); *Reynolds v. Sims*, 377 U.S. 533 (1964) (equal protection clause requires legislative representation in equal proportion for all citizens in a state regardless of where they reside).

<sup>35</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967).

discovered a number of suspect classifications. The High Court has designated that discrimination based upon race, for example, is constitutionally suspect and subject to careful scrutiny.<sup>36</sup> Given the forceful language employed in *Levy* by Mr. Justice Douglas, it is likely that the Court has now included illegitimacy in the list of inherently suspect traits: "[I]t is invidious to discriminate against [illegitimates] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done by the mother."<sup>37</sup>

Despite this pronouncement in *Levy*, the *Strahan* court, by emphasizing the state's interest in the preservation of commercially viable land titles, apparently viewed the equal protection status of the Louisiana succession statute not as an inherently suspect classification affecting civil rights but rather as an economic regulation. However, since illegitimacy may be an inherently suspect trait, a classification based thereon should have been nullified absent the justification of an overriding statutory purpose. In order to determine the existence of an overriding statutory purpose sufficient to deny the illegitimate a place in the line of intestate succession, the Louisiana intestacy statute should have been analyzed in light of two tests: (1) Whether all illegitimates classified in relation to the purpose were situated similarly, and (2) whether the differences between illegitimates and legitimates were pertinent to the subject for which the classification was made. Given this standard, it is necessary to decide whether there are elements of state concern uniquely relevant to intestate succession that would justify a result in *Strahan* different from *Levy*.

The first purpose underlying Louisiana's statute was the state's interest in encouraging marriage and discouraging promiscuity. The statute met the first part of the equal protection test because the purpose of denying illegitimates certain rights in order to dis-

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<sup>36</sup> See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See generally 1 C. ANTHEAU, MODERN CONSTITUTIONAL LAW 589-99 (1969).

<sup>37</sup> 391 U.S. 68, 72 (1968). The following observation has been made concerning illegitimacy as a suspect classification:

Experience in America teaches that a racial classification will usually be perceived as a stigma of inferiority and a badge of opprobrium. The same may be said of many national, ethnic, and religious classifications. In this sense, a racial or national minority differs from an economic minority. In this sense, too, race, lineage, and ethnic origin differ from other congenital and unalterable characteristics such as sex or certain physical disabilities. Indeed, the question whether opprobrium readily attaches to a particular classification may be the touchstone to predicting what other congenital and unalterable traits will be viewed as suspect in the future. *Illegitimacy of birth*, for example, would be a likely candidate under this formulation. *Developments in the Law — Equal Protection supra*, note 31, at 1137. (emphasis added).

courage the birth of children out of wedlock applied equally to all illegitimates. The statute, however, arguably ran afoul of the second test because there is no rational connection between the status of illegitimacy and the conduct of the mother.<sup>38</sup> The purpose of the statute was to forewarn the mother of the societal abuse awaiting her illegitimate child if she did not conform to proper standards of conduct. However, "[t]he rising illegitimate birth rate tends to show that it is not likely that many potential illegitimate mothers are guided by this."<sup>39</sup> Even if imposing disabilities upon an illegitimate child had a prophylactic effect upon the illicit conduct of the mother, it is deplorable to penalize the child for the sins of his mother.<sup>40</sup> In this regard, the legislative purpose of encouraging marriage is no more a rational basis for discrimination in the father-child association than in the mother-child relationship.<sup>41</sup> Moreover,

<sup>38</sup> This two-step analysis can also be illustrated with regard to racial classification: A statute which segregates Negroes passes the first test if it applies equally to all Negroes, but fails the second, since there is no reason for classifying Negroes and whites in separate groups other than the improper reason of maintaining in an unequal position two groups which for all rational purposes are situated similarly. Krause, *supra* note 17, at 486.

<sup>39</sup> Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana — First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338, 347 (1969). In 1940, 89,500 illegitimate children were born as compared with 318,100 illegitimate births in 1967. In 1940, the rate of illegitimacy per 1,000 unmarried women was 7.1, as compared with a rate of 24.0 in 1967. In 1940, the ratio of illegitimates born per 1,000 live births was 37.9 as compared with a ratio of 90.3 in 1967. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, VITAL STATISTICS OF THE U.S., 1967, at Table 25, § 1 (1969).

<sup>40</sup> In regard to the indirect penalty imposed upon the illegitimate, one difference between *Levy* and *Gloia* is noteworthy. In *Levy*, illegitimates sued for the wrongful death of their mother and in *Gloia*, the mother sued for the wrongful death of the illegitimate. The legal distinction between the two seems to be that a direct punishment would be imposed upon the blameless illegitimate were he himself prohibited from suing, but the same directness of discrimination is more elusive where the mother is suing for the wrongful death of her illegitimate decedent. Such a distinction pinpoints the very crux of Mr. Justice Douglas' equal protection analysis in *Levy*, i.e., as to illegitimacy, any attempt to effect social morality through legislative classification fails as violative of equal protection, no matter how good a job the disability does in stopping the illicit conduct of the mother.

<sup>41</sup> In *Levy* and *Gloia*, the majority based familial obligations on the fact of consanguinity. When hearing *Levy* on remand, the Supreme Court of Louisiana did not find it necessary to rule upon whether the United States Supreme Court's decision extended to the father-child relationship, but assumed, *arguendo*, that it did:

The United States Supreme Court has held that, as alleged in the petition in this case, when a parent openly and publicly recognizes and accepts an illegitimate to be his or her child and the child is dependent upon the parent, such an illegitimate is a "child" as expressed in Civil Code Article 2315. *Levy v. State*, 233 La. 73, 80, 216 So. 2d 818, 820 (1968).

This analysis would seem to indicate that the only obstacle in the way of proving consanguinity of child and father is proof of paternity.

Other arguments advanced in support of discrimination in the father-child context are the actual child-father relationship that exists in a family unit and the father's

equalization of legitimate and illegitimate offspring in the context of inheritance would be fully consistent with the result of *Levy* and *Glon* based upon the biological affinity between parent and child.<sup>42</sup>

In scrutinizing Louisiana's second and primary purpose in denying the plaintiff an intestate share in the decedent's real property — maintaining stability of land titles — it is helpful to answer the question whether the Strahan child had ever been acknowledged by his purported father. Although the opinion is unclear on this point, it can be assumed that the plaintiff, if he indeed were the decedent's son, was the unacknowledged illegitimate son of the decedent.<sup>43</sup> Assuming that the illegitimate child had never been formally acknowledged by his father, then dismissal of the plain-

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choice in recognizing or not recognizing his child. See Krause, *supra* note 17, at 495-98, where the author discusses and refutes these points. With regard to the actual father-child relationship, the author states:

[E]ven if children might reasonably be classified on the basis of whether they live and share their lives with their fathers, the definition of these two groups by means of the criterion of birth in or out of wedlock is over-inclusive in that it covers children who are legitimate but who do not live with their fathers and under-inclusive in that it excludes illegitimates who do live with their fathers. *Id.* at 495.

With relation to the father's choice in recognizing or not recognizing the child, the author contends that since "the father voluntarily brought about this injury to a child who was helplessly delivered into his predicament . . . it becomes clear that the decision to withhold legitimate status from his offspring cannot properly be considered a decision for the father to make." *Id.* at 497.

<sup>42</sup> Subsequent to *Levy* and *Glon*, the Supreme Court of New Jersey in *Schmoll v. Creecy*, 54 N.J. 194, 254 A.2d 525 (1969), held that where the legitimate child could bring an action under the wrongful death statute, it would be a denial of equal protection to refuse the same remedy to the illegitimate child. This same interpretation of *Levy* was adopted in *Hebert v. Petroleum Pipe Inspectors, Inc.*, 396 F.2d 237 (5th Cir. 1968), wherein the court held that illegitimate minors were to be considered as "children" under the Jones Act. In *Armijo v. Wesselius*, 73 Wash. 2d 716, 440 P.2d 471 (1968), a case decided prior to *Levy* and *Glon*, an illegitimate child was considered a "child" under the wrongful death statute. Those states which have rejected the child's right to support from his father have done so on the theory that *Levy* solely applied to the biological relationship which exists between the mother and her child. *Baston v. Sears*, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968). This theory has been rejected by both *R—— v. R——*, 431 S.W.2d 152 (Mo. 1968), and *Storm v. None*, 57 Misc. 2d 342, 291 N.Y.S.2d 515 (Fam. Ct. 1968), wherein the courts held that illegitimate children have the same right as legitimate children to require support from their fathers. The equal protection rationale of *Levy* has not only been applied to the rights of the child against the father but also has been extended to the father's rights against the child. In *Munn v. Munn*, 450 P.2d 68 (Colo. 1969), the court held that a father's duty to support his illegitimate child could not differ substantially from the duty owed his legitimate child.

<sup>43</sup> Indications that the plaintiff was unacknowledged were: (1) The court's reference to the plaintiff as the intestate's *alleged* illegitimate son; (2) the court's rationalization of the distinction between acknowledged and unacknowledged illegitimates as reasonable; and (3) the court's assumption that the illegitimate child should share in Louisiana succession *only for purposes of argument*. Assuming the plaintiff had been acknowledged, the court's opinion would have had to focus upon the illegitimate's possibility of sharing in the property as against lawful descendants.

tiff's claim clearly did not violate the equal protection clause.<sup>44</sup> First, all unacknowledged illegitimates *unable to prove paternity* would be situated similarly with respect to the state's interest in protecting commercial land transactions. Secondly, a rational connection arguably existed between the illegitimate's unacknowledged status and the state's objective of protecting heirs or purchasers of the intestate's property from individuals who, for the purpose of reaping windfall benefits, could pose as illegitimate progeny. Recognizing that the procedural burden of proving requisite family relationships rested with Strahan, recovery was properly denied. But to the extent that evidentiary safeguards would diminish the disruption of commercial land transactions where an illegitimate is able to show acknowledgment or paternity, *Strahan* should be re-examined. The Louisiana acknowledgment requirement would no longer seem to be a justifiable basis for denying the illegitimate a legal relationship with his father<sup>45</sup> because Louisiana's vital interest in its stability of land titles could be maintained without discriminating against the illegitimate by having courts require that illegitimate claimants prove paternity before gaining a property interest.<sup>46</sup> Indeed, Mr. Justice Douglas has suggested that the ascertainment of paternity belongs in the realm of proof.<sup>47</sup>

If the illegitimate succeeds in establishing paternity, the state's apprehension with respect to unstable land titles would for several reasons be unfounded. Where a subsequent will is discovered after the probate of a prior will or adjudication of intestacy the subsequent instrument may be probated but bona fide purchasers relying upon the earlier decree are protected.<sup>48</sup> There is no reason why a

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<sup>44</sup> See text accompanying note 8 *supra*.

<sup>45</sup> See note 42 *supra*.

<sup>46</sup> The following standards have been suggested to meet the test of reasonableness for proving requisite family relationships. In order to prove maternity, possession and presentation of a valid birth certificate bearing the names of the mother and child must be produced, testimony must be given to the effect that the child was dependent upon, supported by, and lived with the mother and was reputed to be the child of the alleged mother, or testimony must be given to the effect that the mother lived with and was dependent upon the child, and was reputed to be the mother of the alleged child. In order to prove paternity, it has been suggested that the requirements established by the Social Security Act, 42 U.S.C. § 416(h)(3)(A)(i)-(ii) (Supp. I, 1965), serve as a format. This being the case, the child should (1) be acknowledged in writing by the father; (2) be decreed or ordered the father's child by the court; or (3) produce other evidence satisfying the court that this is the father of the child and that he has been living with or contributing to the child's support. 43 TUL. L. REV. 383, 388 nn.16 & 17 (1969).

<sup>47</sup> Cf. *Giona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 76 (1968).

<sup>48</sup> T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 502 & cases cited n.20 (2d ed. 1953). See also *Eckland v. Vankowski*, 407 Ill. 263, 95 N.E.2d 342 (1950);

different rule should prevail where an illegitimate establishes a claim against the estate of his father subsequent to the probate of his will or an adjudication of intestacy. Given this well-recognized protective rule, the *Strahan* court's assertion that no title to property would ever be secure if illegitimate children were permitted a subsequent share in a decedent's succession is tainted in view of the defense of justifiable reliance.

A uniform statute of limitations would eradicate much of the concern that an illegitimate, perhaps many years later, might assert an interest in previously adjudicated property. Although the length of the statutory period would be a matter of legislative concern, two alternatives can be envisioned. The illegitimate could be required to establish paternity within the lifetime of his father or he might be allowed to establish his claim within a number of years after his father's death. Regardless of the approach adopted, the fact of paternity would have to be recorded on the deed and made a part of public record in order to fully protect potential purchasers.

The protection which a statute of limitations would afford the stability of land titles, however, demands careful circumscription lest the mechanics of proving paternity render nugatory the new-found equality to which the illegitimate is arguably entitled. Recognizing the legal incapacity of a minor illegitimate, one commentator urges that the child be given standing in a paternity suit through a representative or guardian ad litem in order to guarantee the child a means of ascertaining the requisite family relationship.<sup>49</sup> To further safeguard the illegitimate's substantive rights a uniform legitimacy statute has been suggested; such a statute would establish clearly discernible standards including, among other things, reasonable proof of paternity requirements to facilitate the illegitimate's satisfying his procedural burden of proof.<sup>50</sup>

There no longer seems to be any reasonable justification for discrimination against illegitimates in state inheritance laws. These laws have not effected the desired reduction in the illegitimate birth rate. More importantly, the Supreme Court no longer feels bound by tradition, especially when a right as fundamental as equal

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Newbern v. Leigh, 184 N.C. 166, 113 S.E. 674 (1922); Reaves v. Hager, 101 Tenn. 712, 50 S.W. 760 (1899); Simpson v. Cornish, 196 Wis. 125, 218 N.W. 193 (1928).

<sup>49</sup> Krause, *supra* note 39, at 349.

<sup>50</sup> Krause, *Bringing the Bastard Into the Great Society — A Proposed Uniform Act of Legitimacy*, 44 TEXAS L. REV. 829, 839 (1966). In his *Proposed Uniform Act on Legitimacy*, Professor Krause suggests that "if . . . the court is convinced that paternity is established beyond a reasonable doubt, the court shall enter an order . . . providing that the child shall be capable of inheriting . . . as if legitimate." *Id.*